BRITISH COLUMBIA

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Dear Sirs/Mesdames:

AN APPEAL BY PAN-O-RAMIC FARMS (1990) LTD. FROM A DECISION OF THE BRITISH COLUMBIA MILK MARKETING BOARD REGARDING THE NON-RENEWAL OF A TRANSPORTER CONTRACT

On March 31, 2004, a Panel of the British Columbia Farm Industry Review Board (the "Provincial board") granted the Appellant, pursuant to s. 8(8.2) of the *Natural Products Marketing (BC) Act* (the "*Act*") a stay pending appeal of the Milk Board's January 22, 2004 decision notifying the Appellant that the Milk Board was not prepared to renew the Appellant's Transporter Contract for another three month term. The Milk Board's January 22, 2004 letter advised the Appellant, which holds a Milk Board Transporter Licence, that the reasons for non-renewal "are best characterized as ones that pertain to overall performance matters".

The Appellant appealed to the Provincial board under s. 8(1) of the *Act* on the basis that the Milk Board did not notify the Appellant in advance as to what were the "overall performance matters" of concern, thus denying the Appellant the opportunity to respond to those concerns before the decision was made. The Appellant also asserted that the Milk Board has no right to refuse to renew a Transporter Contract arbitrarily, and without valid reasons for non-renewal, it had a reasonable expectation of renewal. Section 8(1) of the *Act* provides, in part, as follows:

> 8(1) A person aggrieved by or dissatisfied with an order, decision or determination of a marketing board or commission may appeal the order, decision or determination by serving the Provincial board with written notice of the appeal…

The Panel's March 31, 2004 stay decision considered the Milk Board's argument, advanced in its March 25, 2004 letter both opposing the stay and making a cross-application to summarily dismiss the appeal, that the matter was not properly appealable as the decision not to renew was a "purely administrative" decision and purely contractual in nature. The Milk Board pointed out that its decision was taken pursuant to a clause in the Transporter Contract (clause 15) that allows either side to decline to renew the contract any time, without cause, with at least two months' notice. The Milk Board argued that sanctity of contract was essential and that the right of appeal cannot extend to decisions regarding which persons the Milk Board chooses to contract. The Milk Board submitted that:

> On principle, if Pan-O-Ramic could be considered to be "dissatisfied", there is no reason why an appeal could not be initiated by the janitorial services company that the Milk Board chooses <u>not</u> to contract with, or the accountants the Milk Board chooses <u>not</u> to contract with, etc.

The Panel's March 31, 2004 reasons dismissed the Milk Board's summary dismissal application. We will not repeat those reasons here; the interested reader should review them in their totality. In summary, the Panel held that in the highly regulated milk industry, the Transporter Contract is not like a contract for janitorial or accounting services. The Transporter Contract is inextricably linked with the Milk Board's public regulatory responsibility to ensure that milk is transported by persons fit to do so, and that it is artificial to seek to unravel the Contract from the licence and the Milk Board's regulatory powers. The Panel stated that the Milk Board's decision is subject to appeal to the Provincial board, and stated as follows (pp. 7-8):

> The appeal on the merits will decide whether the Milk Board had a duty to give the Appellant notice and a chance to be heard before terminating the Agreement, or whether, having advised the Appellant that "overall performance matters" triggered the notice, the Appellant should receive a remedy if the Panel finds that the overall performance matters referred to by the Milk Board are not valid or did not justify giving notice not to continue the Appellant's ability to operate as a transporter. The sole finding we make at this stage is that this is an appealable decision, and the appeal does not meet the test for summary dismissal. [footnote omitted]

Following the issuance of our March 31, 2004 decision, Provincial board staff arranged a May 11, 2004 hearing date for the appeal.

On April 19, 2004, counsel for the Milk Board wrote to the Provincial board expressing what he described as "uncertainty regarding the subject matter of the hearing". Counsel stated that the Milk Board did not purport to terminate the Transporter Contract for cause, and further stated that it interpreted our March 31, 2004 decision as having "nullified", at least on an interlocutory basis, the ability of the Milk Board to rely on clause 15. It stated that this finding has "wide ranging implications for all 'contracts' made between the Milk Board and persons who happen to be licensees". Counsel then advanced additional arguments, supplementary to those it had advanced earlier, to the effect that its payment of money to transporters in exchange for services and court-enforceable contractual rights, removes this Contract from the realm of the "regulatory". Counsel stated: "It is the view of the Milk Board that these matters could (and should) be addressed at the hearing of the appeal."

A pre-hearing conference followed, conducted by Provincial board staff and in the absence of the Panel. The outcome of that call, recorded in Jim Collins' April 28, 2004 letter, was to give all parties a further opportunity to address the Panel on the issue of concern to the Milk Board:

> Given the implications involved, it is understood that the Panel is prepared to have the parties more fully address the issue of whether and under what circumstances there should be regulatory review of transporter contracts.

We pause here to recognise that it is somewhat unusual to agree to allow further argument on a point addressed in previous reasons. However, the argument so vigorously advanced before us by the Milk Board is novel and has not been expressly raised in any previous appeal decision. This issue raises fundamental questions involving the appellate jurisdiction of the Provincial board and its relationship with commodity boards. A final decision on such a jurisdictional question should not be advanced in the context of a "stay" or "summary dismissal" application on a simple exchange of letters. Such a decision should have the benefit of the complete argument before the Panel ensuring the fullest opportunity to properly interpret the jurisdiction conferred upon us by the Legislature, and ensuring that any reviewing court will not be confronted with the disadvantage of encountering entirely new arguments regarding our jurisdiction that were not advanced before us.

In accordance with Mr. Collins' April 28, 2004 letter, the parties agreed to provide the Provincial board with further written submissions regarding this Board's ability to hear this appeal. We have now received and considered supplementary submissions from the parties dated May 10, 2004 and May 13, 2004.

Having carefully reviewed those submissions, we can advise the parties that it is our intention to withhold judgment on the arguments raised therein until after the hearing now scheduled for May 25, 2004. The Panel is not prepared to decide this issue at this stage as a "preliminary question" for three reasons, each of which would independently cause us to proceed as indicated.

First, while the Panel appreciates the parties' efforts to provide additional argument, we are not satisfied that the parties have fully addressed the issues in their arguments. While the Milk Board has relied heavily on the decision in *Red Earth Motel Ltd. v. Alberta (Gaming & Liquor Commission)*, 1998 CarswellAlta 1438 (Alta. QB) (May 10, 2004 submission, pp. 6-8), the Milk Board's submission does not refer to a subsequent Alberta decision which refers to *Red Earth Motel* but which came to the opposite conclusion on identical facts: *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)*, [1999] AJ No. 224 (QB). Similarly, while the Milk Board quoted two paragraphs from Brown and Evans, *Judicial Review of Administrative Action in Canada* (March 10, 2004 argument, p. 4), the Milk Board did not refer the Panel to the next two paragraphs from the same text, which might be understood as significantly qualifying the first two paragraphs. Also, neither party meaningfully addressed the question whether there is a distinction between the scope of *judicial* review of the action of a statutory body entering a contract, and the scope of appeal by an administrative appeal body governed by language such as section 8 of the *Act*. One example of the latter point is *Kane v. University of British Columbia*, [1980] 1 SCR 1105 where the Court appeared to distinguish its role on judicial review from the scope of appeal within the University appellate structure. Finally, we would be assisted by more careful submissions regarding the relationship between the contract and the statute, as has been done in other contexts: see for example *Berry v. Pulley*, [2002] 2 SCR 493 at paras. 48-49. We would like to give the parties the opportunity to address these points before we make our decision.

Second, the Panel notes that the Milk Board's submission concedes that "commercial contractual obligations may nevertheless be reviewed *where the question is whether the contracting authority has exceeded the powers conferred upon it by statute*" (May 10, 2004 submission, p. 8). As we read the Appellant's submission, at least one of the arguments the Appellant makes is that, by statute, the Milk Board cannot adversely affect a transporter licence except where there is cause to do so, and that any contractual term "which in essence permits the Milk Board to cancel a licence" arbitrarily would be beyond the legislative authority of the Milk Board (May 13, 2004 submission of Appellant, pp. 3-4). Whether this argument is correct or incorrect is not for us to decide now, but it does however appear to be a jurisdictional argument as defined by the Milk Board.

Finally, while it is often good policy to attempt to sever off and decide a "preliminary issue" prior to an oral hearing, this is appropriate only where the Panel is satisfied that this serves the interests of efficiency and where the Panel does not require a further factual foundation for the decision to be made. As to efficiency, the appeal is not expected to be lengthy; it will very likely not occupy more than one day. Moreover, there is a strong interest in having this matter decided with some finality rather than having it unresolved while one party seeks to challenge a preliminary ruling one way or the other. Further, the Panel is of the view that, to decide all the issues in their proper context, including the nature of the relationship between the Milk Board and the Appellant, evidence is far preferable to the assertions that have been made in the submissions we have received thus far.

The appeal will proceed as scheduled on May 25, 2004. A careful review of all the submissions suggests that the parties might be assisted by the following summary of the issues arising from their arguments:

- Did the Milk Board have a duty to give the Appellant notice and an opportunity to be heard before advising the Appellant that it would not renew the Agreement, and if so (a) what is the source of that duty, and (b) was that duty satisfied in this case?

- Did the Milk Board's action of refusing to renew the contract adversely affect the transporter licence, and if so how? If the transporter licence was adversely affected by the Milk Board's action, did the Milk Board, despite the contract language, have jurisdiction under the *Act* and the *Milk Marketing Regulation* to adversely affect the licence without a reason grounded either in the conduct of the transporter or other regulatory reasons such as the need to rationalize services?

- If the Milk Board is limited by the requirement that it was not entitled to take this action without reason, were the "overall performance matters" referred to by the Milk Board the actual reason or sufficient reason, or should the Provincial board grant a remedy as a matter of law or sound marketing policy?

The parties are of course at liberty to raise whatever arguments and sub-issues they wish in answer to these questions. It appears to us that, at a minimum, addressing them will require the parties to address the true nature of their relationship, the relationship between contract and the licence, the source and relationship between the Milk Board's contract powers and regulatory powers, the principled basis for distinguishing between "regulatory" and "non-regulatory" action in a situation such as this, and the authorities referred to at page 4 of this letter.
The Panel wishes to make clear to both parties that it has taken considerable care in reviewing their submissions and providing this memorandum precisely because it intends to engage in a full and honest assessment of all arguments. The parties are to govern themselves accordingly.

Dated at Victoria, British Columbia, this 20th day of May 2004.

BRITISH COLUMBIA FARM INDUSTRY REVIEW BOARD
Per

(Original signed by):

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Christine J. Elsaesser, Vice Chair

cc: Tom Demma, General Manager
British Columbia Milk Marketing Board